UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 865

Case No. 941: EAGLETON

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of William Eagleton, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA or the Agency, the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 May and 31 August 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 19 August 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 September 1996, the Applicant filed a corrected application, containing pleas which read, inter alia, as follows:

> "... that the Tribunal [i] order that [the Applicant] be allowed to retain $133,348 of the $134,671 received from the United States Government as partial relief from a catastrophic fire loss of virtually all of [his] possessions stored in a Vienna warehouse, selected by UNRWA, while [he] was on special assignment of the U.N. Secretary-General as

> Special Coordinator for Sarajevo under U.N. Security Council Resolution 900. ... [ii] that the Tribunal rescind the decision of [the] UNRWA Commissioner-General ... dated 9 November 1994 (...) and the decision of [the] U.N. Secretariat Director of Accounts ...
>
> [iii] ... that the Tribunal order that UNRWA pay all 1996 emoluments and income tax reimbursements due [to the Applicant] at the time of [his] retirement that were withheld over [his] objection, plus interest from the date of withholding to the date of payment. Should these amounts withheld be paid ... while this application is pending, I plead that UNRWA pay [the] Applicant for interest from the date of withholding to the date of payment and for [the] cost of the Letter of Credit required by UNRWA as a condition to paying these items. ..."

Whereas the Respondent filed his answer on 29 June 1997;

Whereas, on 19 September 1997, the Applicant requested that oral proceedings be held in the case;

Whereas the Applicant filed written observations on 16 October 1997;

Whereas the facts in the case are as follows:

The Applicant, a citizen of the United States of America, entered the service of the Agency on 1 October 1988, as Deputy Commissioner-General in the Office of the Commissioner-General, at the Assistant Secretary-General level, in Vienna, Austria. In March 1994, the Applicant was preparing to retire and move back to the United States, but, having been appointed Special Coordinator for Sarajevo on 29 March 1994, he decided to remain in Europe. His personal effects had been packed in preparation for the move by the Vienna warehouse of Herber Hausner. Instead of proceeding with the move to the United States, the Applicant chose to store his personal effects with Herber Hausner while he was on assignment in Sarajevo.

On 1 March 1995, the Applicant advised the Officer-in-Charge, Division of Management and Administration, United Nations Protection Force in Sarajevo (UNPROFOR), Zagreb, and the Director of

Administration and Human Resources, UNRWA, Vienna, that on the night of 20 October 1994, a fire in the Vienna warehouse of Herber Hausner had destroyed all of his personal effects stored there. The Applicant estimated that their replacement value was US$800,000. He noted that the warehouse had been chosen by UNRWA as the lowest bidder. Although it had passed fire inspection, it had apparently had no watchman, fire detection equipment or alarm system. The Applicant had not insured the property stored in the warehouse. In his letter of 1 March, the Applicant stated that it was his position that "it was the sudden assignment to Sarajevo that caused our household effects to be held in Vienna and then moved from containers into a warehouse where they were destroyed by fire." He requested information concerning compensation by the United Nations for the loss.

On 25 April 1995, the Officer-in-Charge, Department of Administration and Human Resources, UNRWA, Vienna, informed the Applicant that "nothing can be done at our end", although "[the Applicant] may ... wish to pursue this case further with UNPROFOR on the ground that [he was] forced to keep [his] shipment stored in Vienna because of [his] extended duty stay in Sarajevo."

On 25 August 1995, the Chief, Accounts Division, wrote to the Applicant, advising him that as he had apparently received a refund of the whole of the tax paid by him and on his behalf by the Agency in 1994, in the sum of US$48,000, that amount would be recovered by UNRWA in the form of a salary deduction over a period of six months. Subsequently, the Agency learned that the Applicant had filed a claim with the U.S. tax authorities for a deduction in income due to net operating losses totalling US$522,005. This loss reduced the Applicant's income for the years 1991 and 1992 to zero; the tax paid for those years was therefore refunded to the Applicant. The balance of the Applicant's net operating loss was not sufficient to reduce the Applicant's 1993 earnings to zero; accordingly, he received a partial refund of US$34,710.

On 10 October 1995, the Applicant wrote to the Commissioner-General, asking him to reverse the decision of the Chief, Accounts Division, that the Applicant return to UNRWA that portion of the tax refund attributable to tax paid by UNRWA. The Applicant reported that, according to the calculation of the Chief, Accounts Division, of the total U.S. tax recovery of US$213,993, US$134,671 should go to UNRWA and $79,322 to the Applicant.

In a reply dated 9 November 1995, the Commissioner-General advised the Applicant that he was obliged to repay to UNRWA that part of the refund attributable to tax paid by UNRWA on the Applicant's UNRWA income. On 29 November 1995, the Applicant wrote to the Commissioner-General, requesting agreement for the submission of the case directly to the Tribunal "[s]ince the matter involves issues which are the concern of the United Nations Secretariat in New York." In a reply dated 5 December 1995, the Commissioner-General agreed.

On 18 January 1996, the Chief, Accounts Division, sent to the Applicant the calculation of the Applicant's liability to UNRWA in respect of federal income tax for the year 1994 alone, assuming there had been no casualty loss. The calculation showed that, on that assumption, the Applicant would have been entitled to a refund of $7,584, of which UNRWA's share would be $1,323. On 25 January 1996, the Applicant offered to pay UNRWA the sum of $1,323. On 15 February 1996, the Applicant advised the Chief, Accounts Division, that he authorized the deduction of $1,323 from his next salary payment. In a reply dated 16 February 1996, the Chief, Accounts Division, informed the Applicant that the Agency was owed $134,671 and that, accordingly, $1,323 would not be deducted from his salary. On 22 March 1996, the Applicant advised the Chief,

Accounts Division, that he did not think payment of such sum appropriate since the decision of the Tribunal on the issue was still pending.

On 30 March 1996, the Applicant wrote to the Director of Administration and Human Resources, requesting citation of the authority pursuant to which the Applicant's separation processing from the Agency was being held in abeyance. On 2 April 1996, the Applicant wrote to the Commissioner-General, seeking to retain and use the tax refund from the U.S. pending the resolution of his claim by the Tribunal.

In a reply dated 2 May 1996, the Commissioner-General advised the Applicant that in lieu of holding the processing of the Applicant's separation in abeyance, the Agency would accept a bank guarantee to cover the Applicant's indebtedness. The Agency now holds a letter of credit, dated 8 July 1996, for the sum of $134,671 from the South Side Trust and Savings Bank. The cost to the Applicant of obtaining that letter of credit was $2,693.42.

On 12 September 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The maximum amount of the Agency's claim against the Applicant is $134,671 related to the tax reimbursements for 1991, 1992, 1993 and 1994, of which the Applicant offered to pay US$1,323 related to the federal income tax for the year 1994 alone.

2. The Respondent has no right to claim repayments of the tax paid on the Applicant's behalf for the years 1991, 1992 and 1993, since those years are closed.

3. By its refusal to concede that the refund flowing from the deduction for casualty loss belongs to the Applicant, the Agency has put the Applicant in a position that is worse than that of staff members of other nationalities, contrary to the principles set forth in ST/IC/1995/3 of 17 January 1995.

Whereas the Respondent's principal contentions are:

1. The basis on which the Applicant offered to pay the Agency $1,323, namely that he had, contrary to his obligation, not minimized his tax liability for 1994, was patently false. For this reason, the Applicant cannot now claim that the amount owing to the Respondent is reduced by $1,323.

2. The obligations on a staff member under International Staff Rule 103.15, among which is the obligation to obtain a refund of any sum previously paid, are not limited to any particular year of income. If, as in this case, facts exist that would lead to the adjustment of past years of income, a staff member has an obligation to ensure that appropriate steps are taken to obtain such refund.

3. The Respondent does not seek to deprive the staff member of that portion of his tax refund that relates to his personal income and thus the Applicant is treated in exactly the same way as a staff member who is not a U.S. taxpayer.

The Tribunal, having deliberated from 30 October to 26 November 1997, now pronounces the following judgement:

I. The facts of this case are not in dispute and, accordingly the Tribunal does not believe that oral proceedings are necessary in this case. On 20 October 1994, a large portion of the Applicant's property was destroyed when a fire broke out in a Vienna warehouse where the property was being stored during the Applicant's service on a special assignment in Sarajevo. The property was uninsured, and neither the warehouse management nor UNRWA was willing to compensate the Applicant for his loss. The Applicant therefore took advantage of the casualty loss deduction provided by the United States Internal Revenue Code and, as a result, received a full refund of his 1991, 1992 and 1994 paid tax and a partial refund of his 1993 paid tax. The total refund amounted to US$213,993.00.

II. Pursuant to U.N. practice, UNRWA had reimbursed the Applicant for the portion of his 1991, 1992, 1993 and 1994 United States of America (U.S.A.) income tax which was attributable to his U.N. salary - a total of US$134,671.00. UNRWA now claims that the Applicant is required to transfer the corresponding amount of his tax refund to UNRWA. The Applicant claims that he is entitled to the full refund amount. As a result of this dispute, the Administration required that the Applicant provide UNRWA with a letter of credit for the sum of US$134,671.00.

III. The proper resolution of this matter requires an understanding of the source of the funds which were used to reimburse the Applicant for the taxes imposed by the U.S.A. on the Applicant's U.N. salary. All U.N. employees are subject under the rules of the U.N. staff assessment plan to a direct assessment by the U.N. on their U.N. salaries and emoluments. (Cf. Judgements No. 237, Powell (1979); No. 425, Bruzual (1988)). The majority of U.N. employees are exempt from national taxation under section 18 of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946. The staff assessment plan is intended to approximate national income taxation. The U.S.A., however, is not bound by Section 18 of the Convention, and therefore taxes American U.N. employees on their U.N. salaries as well as their other personal income. In order to provide relief from double taxation to those employees who are subject to both the U.N. staff assessment and national income taxation, the U.N. developed a tax reimbursement system. Under staff regulation 3.3, where a U.N. staff member is subject to both staff assessment and national income taxation with respect to his or her U.N. salary, the U.N. refunds to the employee the full amount of the national income taxes paid on his or her U.N. salary. The source of these tax reimbursements is the Tax Equalization Fund, which consists of the revenues collected from staff assessments.

IV. While the reimbursement by the U.N. of the Applicant's U.S. taxes is designed to protect him from the effect of double taxation, the tax refund from the U.S.A. authorities was intended to compensate him for the casualty loss of his property. The confiscation by the Agency of that payment would vitiate the purpose of the refund by the U.S.A. authorities.

V. For the foregoing reasons, the Tribunal holds that the Applicant is entitled to $133,348 of the $134,671 tax refund issued to him by the U.S.A. Government. Accordingly, the Tribunal orders the Respondent:

(1) To release to the Applicant the letter of credit in the amount of US$134,671.00, which UNRWA currently holds; and

(2) To pay to the Applicant $1,370,42, which represents the fee paid by the Applicant to the South Side Bank (US$2,693.42) in order to obtain the above-referenced letter of credit, minus the $1,323 owed to UNRWA.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary